

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHY KMONICEK,

Plaintiff,

- against -

DAILY BURN, INC.

Defendant.

Docket No. _____

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Kathy Kmonicek (“Kmonicek” or “Plaintiff”) by and through her undersigned counsel, as and for her Complaint against Defendant Daily Burn, Inc., (“Daily” or “Defendant”) hereby alleges as follows:

NATURE OF THE ACTION

1. This is an action for copyright infringement under Section 501 of the Copyright Act. This action arises out of Defendant’s unauthorized reproduction and public display of a copyrighted photograph of endurance athlete Amy Palmiero-Winters owned and registered by Kmonicek, a New York based photojournalist. Accordingly, Kmonicek seeks monetary relief under the Copyright Act of the United States, as amended, 17 U.S.C. § 101 *et seq.*

JURISDICTION AND VENUE

2. This claim arises under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

3. This Court has personal jurisdiction over Defendant because Defendant resides in and/or are doing business in New York.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

PARTIES

5. Kmonicek is a professional photojournalist in the business of licensing her photographs to online, print, and television stations for a fee, having a usual place of business at 56 Downing Avenue, Sea Cliff, New York 11579. Kmonicek's photographs have appeared in many publications around the United States.

6. Upon information and belief, Daily is a corporation duly organized and existing under the laws of the State of Delaware, with a place of business at 555 West 18th Street, New York, New York 10011. Upon information and belief, Daily is registered with the New York Department of State, Division of Corporations to do business in the State of New York. At all times material hereto, Daily has owned and operated a website at the URL: www.dailyburn.com (the "Website").

STATEMENT OF FACTS

A. Background and Plaintiff's Ownership of the Photograph

7. On April 25, 2010, Kmonicek photographed endurance athlete Amy Palmiero-Winters (the "Photograph"). A true and correct copy of the Photograph is attached hereto as Exhibit A.

8. Kmonicek then licensed the Photograph to the New York Times. On April 25, 2010 the New York Times ran an article that featured the Photograph on its web edition entitled, *Strides, Often Painful, but Always, Always Forward*. See <http://www.nytimes.com/2010/04/26/sports/26vecsey.html>. Kmonicek's name was featured in a gutter credit identifying her as the photographer of the Photograph. A true and correct copy of the Photograph in the article is attached hereto as Exhibit B.

9. Kmonicek is the author of the Photograph and has at all times been the sole owner of all right, title and interest in and to the Photograph, including the copyright thereto.

10. The Photograph was registered with the U.S. Copyright Office and was given Copyright Registration Number VA 2-025-196.

B. Defendant's Infringing Activities

11. Upon information and belief, on or about November 26, 2013, Daily ran an article on the Website entitled *The 20 Most Inspiring runners in the U. S.* See

[http://dailyburn.com/life/fitness/most-inspirational-](http://dailyburn.com/life/fitness/most-inspirational-runners/?mtype=5&partner=dailybeast&sub_id=08012014_fertility&utm_campaign=08012014_fertility&utm_content=08012014_fertility&utm_medium=dailybeast&utm_source=dailybeast)

[runners/?mtype=5&partner=dailybeast&sub_id=08012014_fertility&utm_campaign=08012014_fertility&utm_content=08012014_fertility&utm_medium=dailybeast&utm_source=dailybeast.](http://dailyburn.com/life/fitness/most-inspirational-runners/?mtype=5&partner=dailybeast&sub_id=08012014_fertility&utm_campaign=08012014_fertility&utm_content=08012014_fertility&utm_medium=dailybeast&utm_source=dailybeast)

The article prominently featured the Photograph. A true and correct copy of the article is attached hereto as Exhibit C.

12. Daily did not license the Photograph from Plaintiff for its article, nor did Daily have Plaintiff's permission or consent to publish the Photograph on its Website.

FIRST CLAIM FOR RELIEF
(COPYRIGHT INFRINGEMENT AGAINST DAILY)
(17 U.S.C. §§ 106, 501)

13. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1-12 above.

14. Daily infringed Plaintiff's copyright in the Photograph by reproducing and publicly displaying the Photograph on the Website. Daily is not, and has never been, licensed or otherwise authorized to reproduce, publically display, distribute and/or use the Photograph.

15. The acts of Defendant complained of herein constitute infringement of Plaintiff's copyright and exclusive rights under copyright in violation of Sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

16. Upon information and belief, the foregoing acts of infringement by Daily have been willful, intentional, and purposeful, in disregard of and indifference to Plaintiff's rights.

17. As a direct and proximate cause of the infringement by the Defendant of Plaintiff's copyright and exclusive rights under copyright, Plaintiff is entitled to damages and defendant's profits pursuant to 17 U.S.C. § 504(b) for the infringement.

18. Defendant's conduct, described above, is causing, and unless enjoined and restrained by this Court, will continue to cause Plaintiff irreparable injury that cannot be fully compensated by or measured in money damages. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests judgment as follows:

1. That Defendant Daily be adjudged to have infringed upon Plaintiff's copyrights in the Photograph in violation of 17 U.S.C §§ 106 and 501;
2. Plaintiff be awarded Plaintiff's actual damages and Defendant's profits, gains or advantages of any kind attributable to Defendant's infringement of Plaintiff's Photograph;
3. That Defendant be required to account for all profits, income, receipts, or other benefits derived by Defendant as a result of its unlawful conduct;
4. That Plaintiff be awarded pre-judgment interest; and
5. Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable in accordance with Federal Rule of Civil Procedure 38(b).

Dated: Valley Stream, New York
January 23, 2017

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